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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SUBIA WILFREDO NUNEZ,

Defendant and Appellant.

D056298

(Super. Ct. No. JCF23654)

APPEAL from a judgment of the Superior Court of Imperial County, Donal B. Donnelly, Judge. Affirmed.

Subia Wilfredo Nunez appeals from a judgment entered on his guilty plea to one count of conspiracy to possess a controlled substance for sale. He contends that the judgment must be set aside because (1) his plea resulted from a misrepresentation by, or the ineffective assistance of, defense counsel and (2) the trial court failed to orally advise him of the immigration consequences of his plea. We find Nunez's arguments unavailing and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2009 Nunez was arrested for his involvement in a sting in Los Angeles County in which he and others attempted to purchase 10 kilograms of cocaine from an undercover Bureau of Narcotics Enforcement officer for \$150,000. (All relevant dates are in 2009 except as otherwise noted.) Nunez was charged with one count each of conspiracy to commit possession of a controlled substance for sale and possession of money in excess of \$100,000 with the intent to commit an unlawful purchase of cocaine.

Through retained counsel, Nunez argued at the preliminary hearing that the court lacked jurisdiction to bind him because Imperial County was not a proper venue for proceedings on the charges. Specifically, he contended that although the undercover officers had a meeting in Imperial County in January with brokers who ultimately facilitated the transaction between the officers, on one hand, and Nunez and his associates, on the other, that meeting was not sufficient to support venue there for the charges under Penal Code sections 182 and 184. The court rejected counsel's argument, concluding that preliminary arrangements for the transaction occurred at the January meeting, thus making venue proper in Imperial County.

In early August, Nunez reiterated his venue challenge in a formal motion to dismiss the charges against him. Before the motion was heard, however, he agreed to plead guilty to the conspiracy count and stipulated to a sentence of four years in prison in exchange for the prosecutor's agreement to dismiss the money possession count and certain enhancement allegations. The court sentenced Nunez in accordance with the plea

agreement and thereafter he retained new counsel, who filed a notice of appeal and obtained a certificate of probable cause on his behalf.

DISCUSSION

1. *Ineffective Assistance*¹

A criminal defendant has the constitutional right to the effective assistance of counsel during any plea bargaining and pleading stages of the proceedings against him. (*In re Resendiz* (2001) 25 Cal.4th 230, 239, abrogated on another ground by *Padilla v. Kentucky* (2010) 559 U.S. ____ [130 S.Ct. 1473, 1484, 176 L.Ed.2d 284].) Thus, a claim that the defendant's decision to plead guilty resulted from ineffective assistance may support a reversal of the judgment based thereon. (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) To successfully challenge a guilty plea, however, the defendant must establish not only that his counsel was ineffective, but also prejudice resulting therefrom (i.e., a reasonable probability that, but for his counsel's incompetence, he would not have pled guilty but insisted on proceeding to trial). (*Ibid.*, citing *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59.) We address these required elements in turn below.

¹ As a preliminary matter, the Attorney General contends that, by virtue of waiving his right to appeal "any adverse decision" and matters relating to his pending dismissal motion in the proceedings below, Nunez cannot now raise an ineffective assistance claim on appeal. Although we do not find the authorities cited by the Attorney General as particularly persuasive on this issue, we need not reach it because we conclude that the merits of Nunez's ineffective assistance claim are unavailing.

A. Ineffective Assistance

Nunez argues that Imperial County was not the proper venue for prosecution of the charges against him and thus his counsel's conduct in advising him to plead guilty constituted ineffective assistance. However, to resolve an ineffective assistance claim on direct appeal, an appellate record must *clearly demonstrate* that counsel made a mistake that is outside the range of reasonable competence. (*People v. Montiel* (1993) 5 Cal.4th 877, 911.) If the record fails to shed light on why counsel acted or failed to act, ineffective assistance is not established unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation therefor. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, nothing in the record indicates that defense counsel's conduct resulted from anything other than a reasoned and deliberate tactical choice. As the California Supreme Court has recognized, "even when a defendant is of the view that the criminal proceeding has not been filed in an authorized venue," there may be strategic reasons to proceed where the criminal complaint or information was filed rather than in a statutorily designated venue. (*People v. Simon* (2001) 25 Cal.4th 1082, 1106.)

Although the record is silent as to why defense counsel did not pursue the pending dismissal motion here, he may have been influenced by the fact that his earlier attempt to challenge had been unsuccessful. (See also Pen. Code, § 184 [authorizing venue in any jurisdiction where any act, other than the agreement to conspire, occurs].) Even if defense counsel believed that the earlier ruling was erroneous, he might also have reasonably concluded that the prosecutor's offer, including the dismissal of the second

charge and its related five year weight enhancement, was favorable enough to justify Nunez taking the plea rather than seeking dismissal and starting anew with another prosecutor in another jurisdiction.²

Because Nunez has not shown that there was no possible tactical reason for his attorney's conduct, his claim of ineffective assistance must fail. (*People v. Montiel, supra*, 5 Cal.4th at p. 911.)

B. Prejudice

Even if Nunez had shown ineffective assistance, we would in any event conclude that his appellate claim fails because he has not shown a reasonable probability that, but for his counsel's decision not to pursue the dismissal motion, he would have declined to plead guilty. (See *In re Alvernaz, supra*, 2 Cal.4th at p. 934.) Nunez attempts to establish prejudice by contending that it is "obvious[]" he would not have pled guilty to "non-existent" charges. This argument, however, is unpersuasive.

A defendant's statement (in this case, his unsworn appellate contention) that he would not have pled guilty had he received effective assistance of counsel is not sufficient to establish prejudice without objective corroborating evidence. (*In re Resendiz, supra*, 25 Cal.4th at p. 253; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1140.) Nunez does not offer any such corroboration, but rather bases his argument on the

² "[A]n objection to venue, if sustained, does not signify that the defendant will avoid trial on the charges altogether, but instead means only that he or she will face trial in another location." (*People v. Simon, supra*, 25 Cal.4th at p. 1106.) Given the magnitude of the transaction involved, Nunez's implicit contention that charges would not have been filed against him in another jurisdiction is completely speculative.

assumption that the granting of defense counsel's dismissal motion would have allowed him to avoid trial altogether. As noted above, however, the mere fact that a defendant's objection to venue is sustained does not mean that he will avoid prosecution. (*People v. Simon, supra*, 25 Cal.4th at p. 1106.) Thus, to succeed in establishing prejudice, Nunez must show, as a "demonstrable reality," that he would not have been tried elsewhere. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Nunez has not made any such showing and thus cannot meet his burden to establish the prejudice component of his ineffective assistance claim.

2. *Immigration Consequences of the Plea*

Prior to accepting a defendant's plea of guilty, a trial court has a duty to ensure that the defendant is advised regarding the immigration consequences of entering into the plea. (Pen. Code, § 1016.5, subd. (a).) Nunez contends that the trial court was required to orally advise him of such consequences and erred in not doing so. He is mistaken, however, as to the nature of the trial court's obligation under Penal Code section 1016.5, subdivision (a). (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-523 [holding that a trial court need not verbally inform the defendant of the immigration consequences of his plea where the defendant has signed a written change of plea form that complies with the statutory disclosure requirements]; see also *In re Ibarra* (1983) 34 Cal.3d 277, 286 [recognizing that a ritual oral recitation by a trial court of possible consequences of a guilty plea adds little to a defendant's actual knowledge where the defendant has previously read and understood a written form describing those possible consequences].)

Here, Nunez's plea agreement included the statutorily required advisement regarding the immigration consequences of entering into the plea and included Nunez's statement, under penalty of perjury, that he had read and understood all of its provisions. Nunez's attorney also signed the agreement, attesting that he had read and explained its contents to Nunez and advised Nunez of the consequences of entering into the plea. Moreover, at the change of plea hearing, Nunez represented to the court that, with the assistance of his counsel and his interpreter, he had carefully reviewed the plea form. Given these circumstances, the trial court was not required to orally advise Nunez regarding the immigration consequences of his plea.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P.J.

McDONALD, J.